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Communications, LLC**

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

ENTROPIC COMMUNICATIONS, LLC,

Plaintiff,

v.

DISH NETWORK CORPORATION, *et al.*,

Defendants.

Case No.: 2:23-cv-01043-JWH-KES
(Lead Case)

Case No.: 2:23-cv-01047-JWH-KES
(Related Case)

Case No.: 2:23-cv-01048-JWH-KES
(Related Case)

Case No.: 2:23-cv-05253-JWH-KES
(Related Case)

[Assigned to the Honorable John W.
Holcomb]

ENTROPIC COMMUNICATIONS, LLC,

Plaintiff,

v.

COX COMMUNICATIONS, INC., *et al.*,

Defendants.

**PLAINTIFF ENTROPIC
COMMUNICATIONS, LLC'S
REPLY IN SUPPORT OF MOTION
FOR LEAVE TO SUPPLEMENT
COMPLAINT; DECLARATION OF
CASSIDY T. YOUNG IN SUPPORT
THEREOF**

Date: January 16, 2024

Time: 9:00 AM

Courtroom: 9D (Santa Ana)

**PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR LEAVE TO
SUPPLEMENT**

1 ENTROPIC COMMUNICATIONS, LLC,
2 Plaintiff,
3 v.
4 COMCAST CORPORATION, *et al.*,
5 Defendants.

6 ENTROPIC COMMUNICATIONS, LLC,
7 Plaintiff,
8 v.
9 DIRECTV, LLC, *et al.*,
10 Defendants.
11

1 **I. INTRODUCTION**

2 Entropic’s Motion should be granted.¹ Nothing in Comcast’s Opposition
3 suggests otherwise. Indeed, every single factor favors granting Entropic’s Motion.
4 First, Comcast cannot show any prejudice and instead complains about having to
5 defend against Entropic’s claims—a situation common to all defendants. Second,
6 Comcast cannot show undue delay or bad faith where Entropic promptly notified
7 Comcast of its intent to supplement repeatedly in prior filings and during oral
8 argument on discovery issues. Third, Comcast’s attempt to show futility cannot
9 obfuscate the fact that it does not even argue the notice it received was insufficient,
10 only that it runs afoul of what it admits is a minority viewpoint finding post-suit
11 willful infringement claims insufficient. But the majority view is that post-filing
12 activity provides a basis for willful infringement, which supports Entropic’s position.
13 Further, even if this Court were to agree with the minority view, an *exception*
14 *specifically exists for plaintiffs like Entropic* who do not practice the patents they
15 assert. That exception, along with the undisputed fact that Entropic could dismiss
16 this case and file a new suit for willful infringement based on only the notice set forth
17 in this briefing, completely eviscerates Comcast’s position and stated policy
18 rationale. It is time for this case to move beyond the pleading stage so that Entropic
19 can hold Comcast accountable for its willful infringement. For these reasons and
20 those set forth below and in Entropic’s Motion, leave to supplement should be
21 granted.

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23
24
25

¹ The following definitions are used in this brief: Plaintiff Entropic Communications,
26 LLC (“Entropic” or “Plaintiff”); Defendants Comcast Cable Communications
27 Management, LLC; Comcast Corporation; and Comcast Cable Communications,
28 LLC (collectively, “Comcast” or “Defendants”); Entropic’s Motion for Leave to
Supplement Complaint (1043 DE 193) (the “Motion”); Comcast’s Opposition to
Entropic’s Motion for Leave to Supplement Complaint (1043 DE 201) (the
“Opposition”).

II. ARGUMENT

A. Comcast's Opposition confirms good cause exists to allow Entropic to Supplement.

1. Comcast has not established actual prejudice.

Comcast does not even argue prejudice except for a brief mention on the second-to-last page of its brief. Opp. at 20:17–18. There, Comcast meekly asserts that litigating the termination² of the contract that is the basis for *its own* license defense is “clearly prejudicial.” *Id.* But what Comcast describes is no more than garden-variety litigation. It is black-letter law that “the expense incurred in defending against a lawsuit does not amount to legal prejudice.” *Wetlands Water Dist. v. U.S.*, 100 F.3d 94, 97 (9th Cir. 1996). Moreover, Entropic is entitled to allege *the fact* that MaxLinear’s post-filing correspondence with Comcast terminated the VSA. *See* 1043 DE 205 at ¶¶ 182-84. Indeed, Entropic is entitled to a presumption of truth as to that *factual allegation*. Comcast has not established that Entropic alleging such a *fact* is prejudicial.

This situation stands in stark contrast to the Ninth Circuit’s decision in *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149 (9th Cir. 1989), cited by Comcast. There, along with the clearly dilatory tactic of filing a complaint and failing to serve it until receiving an order to show cause why the action shouldn’t be dismissed for lack of prosecution ***a year later*** (*id.* at 1161), the plaintiff advanced an entirely new theory in its motion for leave to amend under a different statutory section. *Id.* Here, there was no delay in seeking to supplement. Comcast has been on notice of

² Comcast states that the Court “held that [termination] has little, if any effect on Comcast’s Motion to dismiss,” (Opp. at 20:3–7), but ignores that the Court was referring to the operative motion to dismiss and indeed stated that “[i]f the termination were effective, then the VSA would cease to apply beginning on May 18, 2023.” 1043 DE 175 at 7. But nothing in the Court’s Order precludes Entropic from alleging the *fact* of MaxLinear’s termination correspondence. Indeed, as Entropic argued in its Motion, it had requested leave to supplement to assert such post-filing conduct. Because the Court’s Order on Comcast’s Motion to Dismiss did not expressly grant such leave, Entropic filed a motion to supplement to allege this and other post-filing conduct, which includes important facts that support Entropic’s allegations of patent infringement against Comcast.

1 Entropic's theory of post-filing willfulness since Entropic filed its First Amended
2 Complaint. 1048 DE 67. Comcast has been on notice of Entropic's theory of post-
3 filing willfulness based on the filing of the original complaint since at least November
4 3, 2023. *See* 1043 DE 193-4 ("Nov. 3, 2023 Special Master Hearing Tr.") at 13:19–
5 24; Young Decl. Ex. A ("Dec. 1, 2023 Special Master Hearing Tr.") at 19:13–19.
6 Thus, there can be no prejudice.

7 **2. Entropic's previous Court-approved amendments do not**
8 **show undue delay or bad faith.**

9 Comcast argues that Entropic unduly delayed by failing to raise "post-suit"
10 willfulness in the First Amended Complaint ("FAC") filed on June 5, 2023. *Opp.* at
11 16–17. Not so. Entropic's Opposition to Comcast's Motion to Dismiss the FAC
12 *asked for leave* to file a supplemental pleading and Entropic has repeatedly stated its
13 intent to rely on post-suit conduct. 1048 DE 96-1 at 17, 18; *Mot.* at 3:1–5; Nov. 3,
14 2023 Special Master Hearing Tr. at 13:19–24 ("And at the very least, our initial
15 complaint could be used as evidence of willfulness; so it is a long way of saying that
16 willfulness is not going away."); Dec. 1, 2023 Special Master Hearing Tr. at 19:13–
17 19 ("And it will come as no surprise because I raised this during the prior discovery
18 dispute hearing, that one of the grounds for willfulness, which is on a patent-by-
19 patent basis, is the original filing of the complaint which relevant case law says is
20 sufficient to support allegations of willfulness."). Further, the Court only determined
21 Entropic's pre-suit willfulness allegations failed to meet the pleading standard a
22 month ago, on November 20. 1043 DE 175. Prior to that Court Order, Entropic
23 believed its willfulness allegations in the FAC to exceed pleading standards. Indeed,
24 the Court explicitly granted Entropic leave to amend its pleading in that November
25 20 Order—a decision rendered using the same standards at issue in this motion for
26 leave to supplement. *Id.* at 2.

27 Comcast's cited cases do not compel a finding of undue delay. *Opp.* at 16. In
28 *Jackson v. Bank of Hawaii*, the Ninth Circuit affirmed a denial of leave to amend.

1 902 F.2d 1385 (9th Cir. 1990). In that decision, the Ninth Circuit concluded that
2 there was undue delay where the plaintiff waited over a year to seek to amend their
3 complaint. *Id.* at 1388. Specifically, “[a]ppellants informed the court of their
4 intention to file an amended complaint in March 1987, in May 1987, and in February
5 1988, but they delayed offering their amended complaint until May 1988.” *Id.* Here,
6 in stark contrast, Entropic’s Motion was filed promptly. Entropic asked for leave to
7 file a supplemental pleading in its June 2023 opposition to Comcast’s June motion to
8 dismiss. *See* 1048 DE 96-1 at 17, 18. The Court granted Comcast’s motion on
9 November 20, giving Entropic until December 8, 2023 to amend its complaint, but
10 was silent as to whether that included supplementation. 1043 DE 175 at 12. Out of
11 an abundance of caution to ensure that its allegations of post-suit conduct would be
12 properly considered, Entropic filed an amended complaint and this Motion on
13 December 8. Mot. at 3:1–13.

14 Similarly, *In re Circuit Breaker Litigation* is also distinguishable. 175 F.R.D.
15 547 (C.D. Cal. 1997). In that case, the court denied a motion for leave to amend
16 where the defendants attempted to add additional causes of action in counterclaims
17 approximately 8 and 5 years after their originally-filed pleading and weeks before
18 the discovery date cut-off (defendant 1) or weeks before summary judgment
19 argument (defendant 2) to evidence undue delay. *Id.* This case was filed this year
20 and has not moved past the motion to dismiss stage such that the discovery cut-off
21 and subsequent summary judgment briefing are many months away. There is no
22 delay here.

23 Comcast’s argument that Entropic acted in bad faith by deciding to move to
24 supplement with the filing of its SAC is simply ridiculous. Opp. at 17:6–18:2. As
25 detailed immediately above and in Entropic’s Motion, Entropic asked for leave to
26 supplement in its opposition to Comcast’s motion to dismiss. *See* 1048 DE 96-1 at
27 17, 18. After the Court granted leave to amend by December 8, Entropic amended
28 **and** again moved for leave to supplement on that same day. *See* 1043 DE 193, 205.

1 During hearings before the Special Master, counsel for Entropic also repeatedly
2 stated its intent to amend the complaint to add allegations related to Comcast’s post-
3 suit conduct in order to establish willfulness. *See, e.g.*, Nov. 3, 2023 Special Master
4 Hearing Tr. at 13:19–24; Dec. 1, 2023 Special Master Hearing Tr. at 19:13–19.

5 Comcast leaps to “bad faith” by asserting that “Entropic does not truly believe
6 that its post-suit theory has any merit,” (Opp. at 17:12–15), but nowhere does
7 Comcast argue that Entropic’s filings are insufficient to provide notice for a willful
8 infringement claim. Thus, both parties agree that Entropic’s post-suit notice is
9 sufficient, but Comcast unreasonably seeks to delay resolution of Entropic’s claims.
10 *See MyMedicalRecords, Inc. v. Jardogs, LLC*, 1 F. Supp. 3d 1020, 1026 (C.D. Cal.
11 2014) (holding that plaintiff could base willful infringement claims on original
12 complaint because “if a plaintiff [] is able to establish the defendant’s knowledge of
13 the alleged infringement based on a prior, though superseded, complaint, the
14 defendant should not be able to escape liability for conduct occurring after the
15 plaintiff files its complaint”).

16 Nor can *Patwardhan v. U.S.* provide a basis for a finding of bad faith here.
17 2014 WL 1092898 (C.D. Cal. Mar. 18, 2014). First, the *Patwardhan* plaintiff was
18 found to have sought leave to amend in bad faith based on the court’s own *sua sponte*
19 characterization of the motion for leave to amend as a “last-ditch attempt” to avoid
20 dismissal. *Id.* at *4 n.4. There, the plaintiff identified its own mistake in naming the
21 wrong Defendant and waited eight months before seeking leave to amend. *Id.* at *5.
22 Simply put, because Entropic could simply file a new case based on this notice, it
23 cannot be considered such a “last-ditch attempt.”

24 Entropic’s motion for leave to supplement was filed on the same day as its
25 Court-approved leave to amend expired, merely 18 days after this Court’s ruling on
26 Comcast’s motion to dismiss, and includes allegations of willful infringement that
27 Comcast cannot successfully dismiss. *See* 1043 DE 193, 205. There is no delay or
28 bad faith here.

1
2 **3. Comcast cannot argue futility to escape that it is now on**
3 **notice of Entropic’s infringement allegations.**

4 Comcast devotes the bulk of its Opposition to attempting to prove the futility
5 of Entropic’s proposed supplement based on generalities instead of the actual facts
6 of this case. Opp. at 8–16. Comcast confusingly argues that the VSA prohibits
7 supplementing a complaint to provide allegations related to an infringement suit the
8 agreement expressly permits, but it matters not how Comcast obtained notice of the
9 Patents-in-Suit, just that it did. *Id.* Comcast also seeks to convince this Court to
10 ignore this District’s prior authority *and* adopt a minority³ view on post-filing
11 conduct as part of willful infringement allegations without regard for the specific
12 facts of this case, which heavily favor granting leave to supplement and fit squarely
13 within an exception to that same view.

14 Comcast has been on notice of the Patents-in-Suit and its alleged infringement
15 of them at least based on Entropic’s original Complaint, the FAC, and infringement
16 contentions served on Comcast, but has continued to infringe. Comcast does not
17 argue that these documents did not provide it notice. Instead, Comcast appears to
18 argue that these facts do not matter because the VSA prohibits filing the original
19 Complaint and FAC in the first place and “Entropic’s theory” is that “it need only
20 establish that it had filed a lawsuit against Comcast.” Opp. at 9–10. Not so. Filing
21 the original Complaint and FAC and serving infringement contentions has
22 sufficiently put Comcast on notice of its infringement. Without a word to say on the
23 sufficiency of this notice, Comcast must agree that providing the allegations
24 contained in these materials outside of litigation would have provided the requisite
25 notice to trigger the willful infringement exception to the VSA. Proving the point,
26 Entropic could simply file a new suit based on this notice at any time, though to do
27 so would be inefficient and incompatible with Rule 15(d). *See Foman v. Davis*, 371

28 ³ Comcast does not contest that its position is a minority view. *See generally* Opp.

1 U.S. 178, 181–82 (1962) (“[T]he purpose of pleading is to facilitate a proper decision
2 on the merits.”); *Northstar Fin. Advisors Inc. v. Schwab Invs.*, 779 F.3d 1036, 1044
3 (citation omitted) (“[Rule 15(d)] circumvents the needless formality and expense of
4 instituting a new action when events occurring after the original filing indicated a
5 right to relief.”). Thus, the true futility lays with Comcast’s efforts to delay
6 adjudication of its willful infringement.

7 A majority of courts in this Circuit and elsewhere have held that a plaintiff can
8 sufficiently plead willfulness based on post-filing conduct. *See* Mot. § IV.A.4; *see*,
9 *e.g.*, *Vaporstream, Inc. v. Snap Inc.*, 2020 WL 136591, at *20 (C.D. Cal. Jan. 13,
10 2020) (“a claim for willful infringement can be based on post-filing conduct alone”);
11 *MyMedicalRecords, Inc.*, 1 F. Supp. 3d at 1026; *Apple Inc. v. Samsung Elecs. Co.*,
12 258 F. Supp. 3d 1013, 1027 (N.D. Cal. 2017) (holding that “post-filing conduct alone
13 can serve as the basis of a jury’s willfulness finding and an award of enhanced
14 damages”).⁴ Continuing its own exercise in futility, Comcast spends six pages of its
15 argument insisting this Court ignore such relevant authority without actually dealing
16 with the facts of the instant case. Indeed, Comcast supposes that granting leave to
17 supplement here would “transform[] every infringement claim into willful
18 infringement unless the defendant immediately ceased all accused conduct and
19 effectively agreed to a preliminary injunction.” *Opp.* at 11:8–12. Comcast’s
20 argument is nonsensical. A defendant with good faith bases to contest validity or
21 infringement cannot be on the hook for willful infringement. However, a defendant
22 who reviews a complaint and, without a good faith basis for non-infringement or
23 invalidity, continues to fight the litigation *and* does not cease their infringement is
24

25 ⁴ *See also T–Rex Prop. AB v. Regal Entm’t Grp.*, 2017 WL 4229372, at *8 (E.D.
26 Tex. Aug. 31, 2017); *Zimmer Surgical, Inc. v. Stryker Corp.*, 2017 WL 3736750, at
27 *2 (D. Del. Aug. 30, 2017); *Finjan, Inc. v. Eset, LLC*, 2017 WL 1063475, at *4
28 (S.D. Cal. March 21, 2017); *Raytheon Co. v. Cray, Inc.*, 2017 WL 1362700, at *5
(E.D. Tex. March 13, 2017); *Huawei Techs. Co. v. T-Mobile US, Inc.*, 2017 WL
1129951, at *4 (E.D. Tex. Feb. 21, 2017); *Simplivity Corp. v. Springpath, Inc.*,
2016 WL 5388951, at *18 (D. Mass. July 15, 2016); *DermaFocus LLC v. Ulthera,*
Inc., 201 F. Supp. 3d 465, 473 (D. Del. 2016).

1 not worthy of pity. Comcast’s argument amounts to asking this Court for a “free
2 pass” to continue to knowingly and willfully infringe. This is not what the VSA
3 permits nor is it fair under the facts of the instant case. Though some courts find
4 “allegations of post-filing knowledge [] generally insufficient to support a claim,”
5 this is because a preliminary injunction can combat post-filing willful infringement.
6 *Pacing Techs., LLC v. Garmin Intern., Inc.*, 2013 WL 444642, at *3 (S.D. Cal. Feb.
7 5, 2013). Those courts recognize an **exception** where “a patentee that neither
8 practices its invention nor directly competes with the alleged infringer may be
9 excused from the injunction requirement.” *Id.* at *3 n.3. Entropic fits squarely within
10 this explicit exception to the minority rule Comcast seeks adherence to.

11 Comcast also seeks to distinguish *MyMedicalRecords*, but simply recites facts
12 without regard to what that court actually held. 1 F. Supp. at 1020; Opp. at 13:25–
13 14:11. Though the *MyMedicalRecords* court discussed the question of “whether a
14 plaintiff may rely on a previous complaint against a subsidiary entity,” it based its
15 denial of the defendant’s motion to dismiss on its answer to the question of whether
16 a plaintiff may rely on “a previously dismissed complaint against the same defendant
17 to prove knowledge of the patent-in-suit.” *Id.* at 1024–25. Specifically, the court
18 noted “[Plaintiff] originally filed suit against Jardogs and Allscripts separately” but
19 that “[Plaintiff] should join the two Defendants in the same action.” *Id.* In response,
20 the plaintiff “dismissed the *Allscripts* action,” but the Court still found that
21 “Allscripts was therefore aware of the [asserted patents] at least as of ... the date
22 MMR filed the *Allscripts* action.” *Id.* at 1025. This confirms: (1) courts in this
23 District follow the view that “[a] defendant should not be able to escape liability for
24 post-filing infringement when the complaint manifestly places the defendant on
25 notice that it allegedly infringes the patents-in-suit” (*id.*), and (2) Entropic can simply
26 dismiss this action and file a new complaint for willful infringement based on the
27 Complaint, FAC, and infringement contentions filed in this action. Comcast’s cited
28 cases from the **minority** viewpoint do not disturb those facts. Nor do those cases

1 address the specific situation here, where Entropic’s entire suit would be dismissed
2 and quickly refiled.

3 And contrary to Comcast’s arguments, granting Entropic leave to amend also
4 makes sense from a policy perspective. Opp. at 13:7–24. First, Entropic does not
5 practice the patents, such that it cannot protect itself from post-suit willfulness with
6 a preliminary injunction. See *Pacing Techs.*, 2013 WL 444642, at *3 n.3. Second,
7 “holding otherwise would give a defendant carte blanche to continue to [willfully]
8 infringe a patent—now with [undisputedly] full knowledge of the patents-in-suit—
9 so long as it was ignorant of the patents prior to being served itself with the
10 complaint.” *Id.* Here, again, it bears noting that a defendant with subjective good-
11 faith belief in defenses has nothing to fear from willful infringement. *Halo Elecs.,*
12 *Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93, 106 (2016) (holding that enhanced damages
13 under 35 U.S.C. § 284 “should generally be reserved for egregious cases typified by
14 willful misconduct”). And further, “[p]recluding a plaintiff from recovering damages
15 for post[-]filing infringement would further contravene Congress’s clear intent in
16 enacting [35 U.S.C.] § 284 (‘Upon finding for the claimant the court *shall award* the
17 claimant damages adequate to compensate for the infringement...’).” *Id.* It is
18 Entropic’s statutory right to obtain adequate damages for Comcast’s post-suit willful
19 infringement.

20 **4. Comcast’s attempt to block Entropic’s addition of two new**
21 **patents should be ignored because it has now filed a notice of**
22 **non-opposition to that motion.**

23 Although Entropic’s Motion for Leave to Amend and Supplement Complaint
24 and Amend Infringement Contentions (1049 DE 114) is not at issue in this briefing,
25 Comcast argues it too should be denied as “futile for the same reasons.” Opp. at
26 19:1–3.⁵ Comcast has now filed a notice of non-opposition to that motion. Thus, its
27

28 ⁵ Comcast admits that it received infringement charts on November 4, 2023 (Opp. at 18) prior to the November 13 filing of Entropic’s Motion for Leave to Amend and

arguments as to that motion should be disregarded given it has not actually opposed that motion and, even if it had, it is improper for Comcast to include arguments as to that motion in its opposition to this Motion.

III. CONCLUSION

For the foregoing reasons, this Court should grant Entropic leave to file a supplemental pleading or confirm that its prior Order granted such relief such that the post-filing conduct alleged in the Second Amended Complaint is appropriate.

Dated: January 2, 2024

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Supplement Complaint and Amend Infringement Contentions such that its arguments for futility, already dealt with *supra* Section II.3, must fail.

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Plaintiff Entropic Communications, LLC, certifies that this brief contains 3,286 words, which complies with the word limit of L.R. 11-6.1.

Dated: January 2, 2024

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